

Second Regular Session 113th General Assembly (2004)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2003 Regular Session of the General Assembly.

HOUSE ENROLLED ACT No. 1277

AN ACT to amend the Indiana Code concerning environmental law.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 13-11-2-25.8, AS ADDED BY HEA 1798-2003, SECTION 21, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 25.8. **(a)** For purposes of IC 13-18:

(1) "Class I wetland" means an isolated wetland described by one

(1) or both of the following:

(A) At least fifty percent (50%) of the wetland has been disturbed or affected by human activity or development by one

(1) or more of the following:

(i) Removal or replacement of the natural vegetation.

(ii) ~~Disturbance~~ or Modification of the natural hydrology.

(B) The wetland supports **only** minimal wildlife **or aquatic** habitat or hydrologic function because the wetland ~~(i)~~ does not provide critical habitat for threatened or endangered species listed in accordance with the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) **and the wetland is characterized by at least one (1) of the following:**

~~(ii)~~ **(i) The wetland** is typified by low species diversity.

~~(iii)~~ **(ii) The wetland** contains greater than fifty percent (50%) areal coverage of non-native invasive species **of vegetation.**

~~(iv)~~ **(iii) The wetland** does not support significant **wildlife or aquatic** habitat. ~~or wildlife uses; or~~

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~~(v)~~ (iv) **The wetland** does not possess significant hydrologic function;

(2) "Class II wetland" means:

(A) an isolated wetland that is not a Class I or Class III wetland; or

(B) a type of wetland listed in subdivision (3)(B) that would meet the definition of Class I wetland if the wetland were not a rare or ecologically important type; and

(3) "Class III wetland" means an isolated wetland:

(A) that is located in a setting undisturbed or minimally disturbed by human activity or development **and that supports more than minimal wildlife or aquatic habitat or hydrologic function;** or

(B) unless classified as a Class II wetland under subdivision (2)(B), that is of one (1) of the following rare and ecologically important types:

- (i) Acid bog.
- (ii) Acid seep.
- (iii) Circumneutral bog.
- (iv) Circumneutral seep.
- (v) Cypress swamp.
- (vi) Dune and swale.
- (vii) Fen.
- (viii) Forested fen.
- (ix) Forested swamp.
- (x) Marl beach.
- (xi) Muck flat.
- (xii) Panne.
- (xiii) Sand flat.
- (xiv) Sedge meadow.
- (xv) Shrub swamp.
- (xvi) Sinkhole pond.
- (xvii) Sinkhole swamp.
- (xviii) Wet floodplain forest.
- (xix) Wet prairie.
- (xx) Wet sand prairie.

(b) For purposes of this section, a wetland or setting is not considered disturbed or affected as a result of an action taken after January 1, 2004, for which a permit is required under IC 13-18-22 but has not been obtained.

SECTION 2. IC 13-11-2-61 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE

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UPON PASSAGE]: **Sec. 61. "Dredged material", for purposes of this chapter and IC 13-18-22, means material that is dredged or excavated from an isolated wetland.**

SECTION 3. IC 13-11-2-74.5, AS ADDED BY HEA 1798-2003, SECTION 24, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 74.5. (a) "Exempt isolated wetland", for purposes of IC 13-18 **and environmental management laws**, means an isolated wetland that:

- (1) is a voluntarily created wetland unless:
 - (A) the wetland is approved by the department for compensatory mitigation purposes in accordance with a permit issued under Section 404 of the Clean Water Act **or IC 13-18-22;**
 - (B) the wetland is reclassified as a state regulated wetland under IC 13-18-22-6(c); or
 - (C) the owner of the wetland declares, by a written instrument:
 - (i) recorded in the office of the recorder of the county or counties in which the wetland is located; and
 - (ii) filed with the department;
 that the wetland is to be considered in all respects to be a state regulated wetland;
- (2) exists as an incidental feature in or on:
 - (A) a residential lawn;
 - (B) a lawn or landscaped area of a commercial or governmental complex;
 - (C) agricultural land;
 - (D) a roadside ditch;
 - (E) an irrigation ditch; or
 - (F) a manmade drainage control structure;
- (3) is a fringe wetland associated with a private pond;
- (4) is, or is associated with, a manmade body of surface water of any size created by:
 - (A) excavating;
 - (B) diking; or
 - (C) excavating and diking;
 dry land to collect and retain water for or incidental to agricultural, commercial, industrial, or aesthetic purposes;
- (5) subject to subsection ~~(b)~~, **(c)**, is a Class I wetland with ~~a delineation~~ **an area, as delineated**, of one-half (1/2) acre or less;
- (6) subject to subsection ~~(c)~~, **(d)**, is a Class II wetland with ~~a delineation~~ **an area, as delineated**, of one-fourth (1/4) acre or less;

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(7) is located on land:

(A) subject to regulation under the United States Department of Agriculture wetland conservation rules, also known as Swampbuster, because of voluntary enrollment in a federal farm program; and

(B) used for agricultural or associated purposes allowed under the rules referred to in clause (A); or

(8) is constructed for reduction or control of pollution.

(b) For purposes of subsection (a)(2), an isolated wetland exists as an incidental feature:

(1) if:

(A) the owner or operator of the property or facility described in subsection (a)(2) does not intend the isolated wetland to be a wetland;

(B) the isolated wetland is not essential to the function or use of the property or facility; and

(C) the isolated wetland arises spontaneously as a result of damp soil conditions incidental to the function or use of the property or facility; and

(2) if the isolated wetland satisfies any other factors or criteria established in rules that are:

(A) adopted by the water pollution control board; and

(B) not inconsistent with the factors and criteria described in subdivision (1).

(c) The total acreage of Class I wetlands on a tract to which the exemption described in subsection (a)(5) may apply is limited to the larger of:

(1) the acreage of the largest individual isolated wetland on the tract that qualifies for the exemption described in subsection (a)(5); and

(2) fifty percent (50%) of the cumulative acreage of all individual isolated wetlands on the tract that would qualify for the exemption described in subsection (a)(5) but for the limitation of this subsection.

(d) The total acreage of Class II wetlands on a tract to which the exemption described in subsection (a)(6) may apply is limited to the larger of:

(1) the acreage of the largest individual isolated wetland on the tract that qualifies for the exemption described in subsection (a)(6); and

(2) thirty-three and one-third percent (33 1/3%) of the cumulative acreage of all individual isolated wetlands on the tract that would

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qualify for the exemption described in subsection (a)(6) but for the limitation of this subsection.

(e) An isolated wetland described in subsection (a)(5) or (a)(6) does not include an isolated wetland on a tract that contains more than one (1) of the same class of wetland until the owner of the tract notifies the department that the owner has selected the isolated wetland to be an exempt isolated wetland under subsection (a)(5) or (a)(6) consistent with the applicable limitations described in subsections (c) and (d).

SECTION 4. IC 13-11-2-265, AS AMENDED BY HEA 1798-2003, SECTION 31, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 265. (a) "Waters", for purposes of water pollution control laws and environmental management laws, means:

- (1) the accumulations of water, surface and underground, natural and artificial, public and private; or
- (2) a part of the accumulations of water;

that are wholly or partially within, flow through, or border upon Indiana.

(b) The term "waters" does not include:

- (1) an exempt isolated wetland;
- (2) a private pond; or
- (3) an off-stream pond, reservoir, wetland, or other facility built for reduction or control of pollution or cooling of water before discharge.

(c) The term includes all waters of the United States, as defined in Section 502(7) of the federal Clean Water Act (33 U.S.C. 1362(7)), that are located in Indiana.

SECTION 5. IC 13-18-22-2, AS ADDED BY HEA 1798-2003, SECTION 38, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 2. (a) The board may adopt rules under IC 4-22-2 and IC 13-14 not later than February 1, ~~2004~~, **2005**, to implement the part of the definition of Class I wetland under IC 13-11-2-25.8(1)(B).

(b) Before the adoption of rules by the board under subsection (a), the department shall determine the class of a wetland in a manner consistent with the definitions of Class I, II, and III wetlands in IC 13-11-2-25.8.

(c) The classification of an isolated wetland that is based on the level of disturbance of the wetland by human activity or development may be improved to a higher numeric class if an action is taken to restore the isolated wetland, in full or in part, to the conditions that existed on the isolated wetland before the

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disturbance occurred.

SECTION 6. IC 13-18-22-3, AS ADDED BY HEA 1798-2003, SECTION 38, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. (a) An individual permit is required to authorize a wetland activity in a Class III wetland.

(b) Except as provided in section 4(a) of this chapter, an individual permit is required to authorize a wetland activity in a Class II wetland.

(c) The board shall adopt rules under IC 4-22-2 and IC 13-14 not later than June 1, ~~2004~~, **2005**, to govern the issuance of individual permits by the department under subsections (a) and (b).

SECTION 7. IC 13-18-22-4, AS ADDED BY HEA 1798-2003, SECTION 38, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4. (a) ~~A general permit is authorized for~~ Wetland activities with minimal impact in **Class I wetlands and** Class II wetlands, including the activities analogous to **those allowed under** the nationwide permit program (as published in 67 Fed. Reg. 2077-2089 (2002)), **shall be authorized by a general permit rule.**

(b) ~~A general permit is authorized for~~ Wetland activities in Class I wetlands **shall be authorized by a general permit rule.**

(c) The board shall adopt rules under IC 4-22-2 and IC 13-14 not later than February 1, ~~2004~~, **2005**, to establish and implement the general permits ~~authorized~~ **described** in subsections (a) and (b).

SECTION 8. IC 13-18-22-5, AS ADDED BY P.L.282-2003, SECTION 38, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 5. (a) The rules adopted under section 3 of this chapter:

(1) must require that the applicant demonstrate, as a prerequisite to the issuance of the permit, that wetland activity:

(A) is:

(i) without reasonable alternative; and

(ii) reasonably necessary or appropriate;

to achieve a legitimate use proposed by the applicant on the property on which the wetland is located; and

(B) for a Class III wetland, is without practical alternative and will be accompanied by taking steps that are practicable and appropriate to minimize potential adverse impacts of the discharge on the aquatic ecosystem of the wetland;

(2) except as provided in subsection (c), must establish that compensatory mitigation will be provided as set forth in section 6 of this chapter to reasonably offset the loss of wetlands allowed by the permits; and

(3) may prescribe additional conditions that are reasonable and

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necessary to carry out the purposes of this chapter.

(b) The rules adopted under section 4 of this chapter must require, as a prerequisite to the applicability of the general permit by rule to a specific wetland activity, that the person proposing the discharge submit to the department a notice of intent to be covered by the general permit by rule that:

- (1) identifies the wetlands to be affected by the wetland activity; and
- (2) except as provided in subsection (c), provides a compensatory mitigation plan as set forth in section 6 of this chapter to reasonably offset the loss of wetlands allowed by the general permit.

(c) Under subsections (a) and (b), the rules adopted under sections 3 and 4 of this chapter may provide for exceptions to compensatory mitigation in specific, limited circumstances.

(d) For purposes of subsection (a)(1)(A):

- (1) a resolution of the executive of the county or municipality in which the wetland is located; or
- (2) a permit or other approval from a local government entity having authority over the proposed use of the property on which the wetland is located;

that includes a specific finding that the wetland activity is ~~reasonably necessary or appropriate to achieve the intended use of the property as described in subsection (a)(1)(A)~~ is considered conclusive evidence of that fact.

SECTION 9. IC 13-18-22-7, AS ADDED BY HEA 1798-2003, SECTION 38, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 7. (a) The department shall:

- (1) administer the permit programs established by this chapter; and
- (2) review and issue decisions on applications for permits to undertake wetland activities in state regulated wetlands in accordance with the rules issued by the board under this chapter.

(b) Before the adoption of rules by the board under this chapter, the department shall:

- (1) issue individual permits under this chapter consistent with the general purpose of this chapter; and
 - (2) for wetland activities in Class I wetlands, issue permits under this subsection:
 - (A) that are simple, streamlined, and uniform;
 - (B) that do not require development of site specific provisions;
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(C) promptly upon submission by the applicant to the department of a notice of registration for a permit.

(c) Not later than June 1, ~~2003~~, **2004**, the department shall make available to the public:

- (1) a form for use in applying for a permit under subsection (b)(1); and
- (2) a form for use in submitting a notice of registration for a permit to undertake a wetland activity in a Class I wetland under subsection (b)(2).

SECTION 10. IC 13-18-22-8, AS ADDED BY HEA 1798-2003, SECTION 38, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 8. (a) ~~The Subject to subsection (f),~~ the department shall make a decision to issue or deny an individual permit under section 3 or 7(b)(1) of this chapter not later than one hundred twenty (120) days after receipt of the **completed** application. If the department fails to make a decision on a permit application by ~~that deadline, the deadline under this subsection or subsection (f),~~ a permit is considered to have been issued by the department in accordance with the application.

(b) ~~Except as provided in subsection (d),~~ A general permit under section 4 of this chapter ~~is considered to have been issued becomes effective with respect to an applicant a proposed wetland activity that is within the scope of the general permit on the thirty-first day after the department receives a notice of intent of from the person proposing the wetland activity that the wetland activity be authorized under the general permit. if the department has not previously authorized the wetland activity.~~

(c) Except as provided in subsection (d), a permit to undertake a wetland activity in a Class I wetland under section 7(b)(2) of this chapter is considered to have been issued to an applicant on the thirty-first day after the department receives a notice of registration submitted under section 7(b)(2) of this chapter if the department has not previously authorized the wetland activity.

(d) The department may deny a registration for a permit **for cause** under subsection ~~(b)~~ or (c) before the period specified in subsection ~~(b)~~ or (c) expires.

(e) The department must support a denial under subsection (a) or (d) by a written statement of reasons.

(f) The department may notify the applicant that the completed application referred to in subsection (a) is deficient. If the department fails to give notice to the applicant under this subsection not later than fifteen (15) days after the department's

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receipt of the completed application, the application is considered not to have been deficient. After receipt of a notice under this subsection, the applicant may submit an amended application that corrects the deficiency. The department shall make a decision to issue or deny an individual permit under the amended application within a period that ends a number of days after the date the department receives the amended application equal to the remainder of:

- (1) one hundred twenty (120) days; minus
- (2) the number of days the department held the initial application before giving a notice of deficiency under this subsection.

SECTION 11. IC 13-18-22-10, AS ADDED BY HEA 1798-2003, SECTION 38, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 10. (a) **Except as provided in subsection (b),** the department has no authority over the:

- (1) filling;
- (2) draining; or
- (3) elimination by other means;

before January 1, ~~2003~~, **2004**, of a wetland that would have been an isolated wetland.

(b) The department has authority over wetland activities in an isolated wetland, including an exempt isolated wetland, that are subject to the provisions of:

- (1) a National Pollutant Discharge Elimination System (NPDES) permit issued by the department under 33 U.S.C. 1342;
- (2) an agreed order under IC 13-30-3-3, consent order, or consent decree executed by the department and the regulated party;
- (3) an order issued under IC 13-30-3-4; or
- (4) a judgment of a court enforcing or upholding an enforcement order or decree described in subdivision (2) or (3);

that became effective before January 1, 2004.

SECTION 12. IC 13-11-2-166.5 IS REPEALED [EFFECTIVE UPON PASSAGE].

SECTION 13. HEA 1798-2003, SECTION 41, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: SECTION 41. (a) The environmental quality service council shall do the following:

- (1) Monitor the implementation of SECTIONS 21 through 25, 27



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through 35, 38, and 39 of this act.

(2) Review the role of the department of environmental management with respect to action on requests under Section 401 of the Clean Water Act (33 U.S.C. 1341) for certifications concerning projects subject to permit requirements under Section 404 of the Clean Water Act (33 U.S.C. 1344), and recommend whether statutory direction is appropriate or necessary in defining that role.

(3) Complete its consideration of the options for statutory definition of "private pond" as used in the definition of "waters" in IC 13-11-2-265, as amended by this act, and:

(A) recommend an option; and

(B) include with the recommendation a statement of rationale for the recommendation.

(4) Evaluate the tensions between existing programs for wetlands protection and for local drainage and recommend principles and policies for ameliorating those tensions, taking into consideration the rationale and objectives for both programs.

(5) Submit its final report on the matters described in subdivisions (1) through (4) before November 1, ~~2003~~, **2004**, to:

(A) the governor; and

(B) the executive director of the legislative services agency.

(b) The environmental quality service council shall:

(1) conduct an ongoing evaluation of the implementation of the permit program for state regulated wetlands under IC 13-18-22, as added by this act;

(2) recommend any adjustments to the program referred to in subdivision (1) that are considered advisable to improve the operation and effectiveness of the program, consistent with the purpose of providing an efficient permitting process and enhancing the attainment of an overall goal of no net loss of state regulated wetlands; and

(3) submit its final report on the matters described in subdivisions (1) and (2) before November 1, ~~2005~~, **2006**; to:

(A) the governor; and

(B) the executive director of the legislative services agency.

(c) This SECTION expires January 1, ~~2006~~, **2007**.

SECTION 14. An emergency is declared for this act.

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Speaker of the House of Representatives

President of the Senate

President Pro Tempore

Approved: _____

Governor of the State of Indiana

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